

## § 10.27

- (1) Name, address, and social security number of each worker;
- (2) The worker's occupation(s) or classification(s);
- (3) The rate or rates of wages paid;
- (4) The number of daily and weekly hours worked by each worker;
- (5) Any deductions made; and
- (6) The total wages paid.

(b) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with workers at the worksite during normal working hours.

(c) Nothing in this part limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, or their implementing regulations.

### § 10.27 Anti-kickback.

All wages paid to workers performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (except as set forth in §10.23), rebate, or kickback on any account. Kickbacks directly or indirectly to the employer or to another person for the employer's benefit for the whole or part of the wage are prohibited.

### § 10.28 Tipped employees.

(a) *Payment of wages to tipped employees.* With respect to workers who are tipped employees as defined in §10.2 and this section, the amount of wages paid to such employee by the employer's employer shall be equal to:

- (1) An hourly cash wage of at least:
  - (i) \$4.90 an hour beginning on January 1, 2015;
  - (ii) For each succeeding 1-year period until the hourly cash wage equals 70 percent of the wage in effect under section 2 of the Executive Order, the hourly cash wage applicable in the prior year, increased by the lesser of \$0.95 or the amount necessary for the hourly cash wage to equal 70 percent of the wage in effect under section 2 of the Executive Order;
  - (iii) For each subsequent year, 70 percent of the wage in effect under section 2 of the Executive Order for such year rounded to the nearest multiple of \$0.05; and

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(2) An additional amount on account of the tips received by such employee (tip credit) which amount is equal to the difference between the hourly cash wage in paragraph (a)(1) of this section and the wage in effect under section 2 of the Executive Order. Where tipped employees do not receive a sufficient amount of tips in the workweek to equal the amount of the tip credit, the employer must increase the cash wage paid for the workweek under paragraph (a)(1) of this section so that the amount of the cash wage paid and the tips received by the employee equal the minimum wage under section 2 of the Executive Order.

(3) An employer may pay a higher cash wage than required by paragraph (a)(1) of this section and take a lower tip credit but may not pay a lower cash wage than required by paragraph (a)(1) of this section and take a greater tip credit. In order for the employer to claim a tip credit, the employer must demonstrate that the worker received at least the amount of the credit claimed in actual tips. If the worker received less than the claimed tip credit amount in tips during the workweek, the employer is required to pay the balance on the regular payday so that the worker receives the wage in effect under section 2 of the Executive Order with the defined combination of wages and tips.

(4) If the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 *et seq.*, or any other applicable law or regulation is higher than the wage required by section 2 of the Executive Order, the employer shall pay additional cash wages equal to the difference between the wage in effect under section 2 of the Executive Order and the highest wage required to be paid.

(b) *Tipped employees.* (1) As provided in §10.2, a covered worker employed in an occupation in which he or she receives tips is a "tipped employee" when he or she customarily and regularly receives more than \$30 a month in tips. Only tips actually retained by the employee after any tip pooling may be counted in determining whether the person is a "tipped employee" and in applying the provisions of section 3 of the Executive Order. An employee may

be a “tipped employee” regardless of whether the employee is employed full time or part time so long as the employee customarily and regularly receives more than \$30 a month in tips. An employee who does not receive more than \$30 a month in tips customarily and regularly is not a tipped employee for purposes of the Executive Order and must receive the full minimum wage in section 2 of the Executive Order without any credit for tips received under the provisions of section 3.

(2) *Dual jobs.* In some situations an employee is employed in a tipped occupation and a non-tipped occupation (dual jobs), as for example, where a maintenance person in a hotel also works as a server. In such a situation if the employee customarily and regularly receives at least \$30 a month in tips for the work as a server, the employee is a tipped employee only when working as a server. The tip credit can only be taken for the hours spent in the tipped occupation and no tip credit can be taken for the hours of employment in the non-tipped occupation. Such a situation is distinguishable from that of a tipped employee performing incidental duties that are related to the tipped occupation but that are not directed toward producing tips, for example when a server spends part of his or her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. Related duties may not comprise more than 20 percent of the hours worked in the tipped occupation in a workweek.

(c) *Characteristics of tips.* A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a fixed charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. Tips are the property of the employee whether or not the employer has taken a tip credit. The employer is prohibited from using an employee’s tips, whether or not it has taken a tip credit, for any reason other than as a credit against its minimum wage obligations under the Executive Order to the employee,

or in furtherance of a valid tip pool. An employer and employee cannot agree to waive the workers right to retain his or her tips. Customers may present cash tips directly to the employee or may designate a tip amount to be added to their bill when paying with a credit card or by other electronic means. Special gifts in forms other than money or its equivalent such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of determining wages paid under the Executive Order.

(d) *Service charges.* (1) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer’s establishment, is not a tip and, even if distributed by the employer to its workers, cannot be counted as a tip for purposes of determining if the worker is a tipped employee. Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to workers of the hotel, the amounts so distributed are not tips.

(2) As stated above, service charges and other similar sums are considered to be part of the employer’s gross receipts and are not tips for the purposes of the Executive Order. Where such sums are distributed by the employer to its workers, however, they may be used in their entirety to satisfy the wage payment requirements of the Executive Order.

(e) *Tip pooling.* Where tipped employees share tips through a tip pool, only the amounts retained by the tipped employees after any redistribution through a tip pool are considered tips in applying the provisions of FLSA section 3(t) and the wage payment provisions of section 3 of the Executive Order. There is no maximum contribution percentage on valid mandatory tip pools, which can only include tipped employees. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees’ tips for any other purpose.

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(f) *Notice.* An employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit. The employer must inform the tipped employee of the amount of the cash wage that is to be paid by the employer, which cannot be lower than the cash wage required by paragraph (a)(1) of this section; the additional amount by which the wages of the tipped employee will be considered increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to tipped employees; and that the tip credit shall not apply to any worker who has not been informed of these requirements in this section.

### **§ 10.29 Notice.**

(a) The contractor must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. With respect to service employees on contracts covered by the Service Contract Act and laborers and mechanics on contracts covered by the Davis-Bacon Act, the contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes.

(b) With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by workers.

(c) Contractors that customarily post notices to workers electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

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### **Subpart D—Enforcement**

#### **§ 10.41 Complaints.**

(a) Any worker, contractor, labor organization, trade organization, contracting agency, or other person or entity that believes a violation of the Executive Order or this part has occurred may file a complaint with any office of the Wage and Hour Division. No particular form of complaint is required. A complaint may be filed orally or in writing. If the complainant is unable to file the complaint in English, the Wage and Hour Division will accept the complaint in any language.

(b) It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. Disclosure of such statements shall be governed by the provisions of the Freedom of Information Act (5 U.S.C. 552, *see* 29 CFR part 70) and the Privacy Act of 1974 (5 U.S.C. 552a).

#### **§ 10.42 Wage and Hour Division conciliation.**

After receipt of a complaint, the Administrator may seek to resolve the matter through conciliation.

#### **§ 10.43 Wage and Hour Division investigation.**

The Administrator may investigate possible violations of the Executive Order or this part either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator may conduct interviews with the relevant contractor, as well as the contractor's workers at the worksite during normal work hours; inspect the relevant contractor's records (including contract documents and payrolls, if applicable); make copies and transcriptions of such records; and require the production of any documentary or other evidence the